

## CRIMINAL LAW

### *Proposition 19 and the Changing Tide of Drug Laws*

by Dana Grimes, Column Editor

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**More like Amsterdam?** Proposition 19 – the Regulate, Control, and Tax Cannabis Act of 2010 – will be on the November 2, 2010 statewide ballot. Governor Arnold Schwarzenegger has stated, “I think it’s time for a debate. And I think we ought to study very carefully what other countries are doing that have legalized marijuana and other drugs, what effect it had on those countries, and are they happy with that decision.” (May 5, 2009. “Arnold: Time To Talk About Legalizing Pot.” *The Huffington Post*.)

#### **The Law’s Schizophrenic Approach to the Vices**

Part of the dilemma with our current system is the dichotomy between the draconian punishments for certain proscribed conduct when it is criminal and the unrestricted way those same vices are advertised when they are legal.

For instance, these days the back page of any *San Diego Reader* magazine is full of advertisements for marijuana dispensaries. With an easily-obtained doctor’s recommendation for marijuana, you can become a patron of a variety of establishments, from “Higher Healing” to “Chronic ReLeaf,” and take advantage of specials such as, “Free Gram of Choice.” [For a more comprehensive list of dispensaries, see [weedmaps.com](http://weedmaps.com).] On the other hand, breaking the law, especially the federal law, as it relates to marijuana, can still lead to very serious consequences. Just around the corner from “Front Street Herbal Health” dispensary is the federal courthouse on Front Street, where it is a common occurrence for an 18-year-old with no record to be sentenced to prison for being a mule (*i.e.*, driving marijuana into the country at the request of someone paying him some nominal fee, like \$500). Or, for instance, although growing marijuana is legal in some instances under Prop. 215, the Compassionate Use Act, if you have 100 plants (even seedlings) growing at your house, the mandatory minimum federal prison sentence is five years. Title 21 U.S.C. §841.

Let’s examine the legalization of a different vice: gambling. Gambling is illegal in many forms, but the forms in which it is legal, such as the state lottery and Indian reservations, are forced upon the public in loud and often misleading advertisements. Many poor Americans believe winning the lottery is their best chance of accumulating a few hundred thousand dollars in their lifetime and they spend a significant portion of their disposable income on the games. [The odds of winning the Mega Millions jackpot are 1:175,711,536.]

In many ways, the legalization of gambling is an interesting comparison to the legalization of controlled substances. Of course, the justification for allowing the state to run gambling is the generation of revenue. In terms of social harm, most social scientists would agree there is no question the state lottery increases social harm and that it does so to the people least able to bear the financial burden of supplementing state revenue. The California state lottery is essentially a highly regressive tax that only survives by advertising and creating false hopes among the disenfranchised and destitute sections of society.

The legalization of marijuana and other drugs would generate taxes across a wider social demographic. And, just as the end of Prohibition took the alcohol industry out of the hands of the Mafia, legalizing and taxing the distribution of marijuana and other drugs would allow quality control in an industry that currently has none, while simultaneously undermining the primary financial base of the violent cartels responsible for destabilizing Mexico and much of South America.

The present approach toward drugs in California—not to mention the conflicting federal law—is quite confusing. In contrast to most other non-traditionally prescribed controlled substances, simple marijuana possession is basically decriminalized. Under Health & Safety Code §11357(b), the possession of less than one ounce of marijuana is a misdemeanor punishable by a fine, while selling marijuana is a felony and may result in a prison sentence under Health & Safety Code §11360.

In November 1996, voters passed Proposition 215, the Compassionate Use Initiative, which legalized the cultivation and possession of marijuana in California for medical purposes. The reality of the implementation of Proposition 215 is that more people with the required doctor's recommendations are free spirits in their 20s, not glaucoma patients. The passage of Proposition 215 has basically been a further step toward legalizing the use and, to a certain extent, the distribution of marijuana. [We still believe there are great risks to dispensaries and other providers, because the realities of distributing to "patients," is often beyond the rather strict statutes and Attorney General Guidelines on point.]

### **Current Law: Penal Code §1000**

Under California's drug diversion program, Penal Code §1000, non-violent drug offenders with no prior felonies or other drug diversions within the past five years *must* be diverted and referred to education, treatment and rehabilitation classes. There must be no evidence of a violation relating to narcotics or dangerous drugs other than the offense that qualifies for diversion. See, *People v. Covarrubias* (2d Dist. 1993) 18 Cal.App. 4th 639, 642, [defendant need not actually be charged with disqualifying offense]. Upon successful completion of the diversion program, the guilty plea is dismissed [the defendant is never sentenced]. This protects the defendant's record. An eligible defendant may be diverted for a violation of a wide variety of statutes, ranging from Health & Safety Code §11350 (felony cocaine possession) to Health & Safety Code §11358 (cultivation of marijuana for personal use), Health & Safety Code §11550 (being under the influence of a controlled substance. See, Penal Code §1000(A)).

### **Current Law: Prop. 36**

The passage of Proposition 36 in 2000, codified at Penal Code §1210 *et seq.*, similarly reflected the attitude of many Californians who consider drug abuse a problem that should be addressed primarily through treatment, rather than the criminal justice system. Defendants ineligible for Penal Code §1000 may still be eligible for Prop. 36, which allows non-violent drug offenders to attend treatment instead of serving time in custody. In contrast to Penal Code §1000, Prop. 36 defendants do end up with a conviction.

### **November's Proposition 19**

Proposition 19 proposes to change state law to legalize the possession and cultivation of limited amounts of marijuana for personal use by individuals age 21 or older, as well as authorize various commercial marijuana-related activities. Since it is a state measure, the same marijuana-related activities would continue to be prohibited under federal law. To what extent the federal government would enforce them remains an open (and important) question.

Under Proposition 19, laws related to minors and safety would be implemented, many of them mirroring the laws in place regarding cigarettes and/or alcohol; the smoking of marijuana in the presence of minors is not permitted under the measure. There would be no change to the driving under the influence laws. [Currently, it is illegal to drive under the influence of marijuana or any controlled substance, even a validly prescribed one, if it impairs a person's ability to operate a motor vehicle.] Similarly, there would be no change to the laws prohibiting the possession of marijuana on school grounds, and providing marijuana to a minor would remain a misdemeanor offense.

### **Social Cost of Legalizing Marijuana**

There is a social cost to vices and, of course, controlled substances have the potential to be addicting. However, compared to alcohol, the social cost of marijuana seems unlikely to involve the side effect of violent crime. [In fact, anecdotal evidence leads our office to believe less bar fights would occur if more 21-year-old men were under the influence of marijuana instead of alcohol.]

### **Effects of Passing Prop. 19**

The California Legislative Analyst's Office ("LAO"), which provides non-partisan fiscal and policy advice, released a report on Proposition 19. The report states that Proposition 19 will allow state and local governments to tax marijuana, generating hundreds of millions of dollars in revenue. The LAO report states: "Proposition 19 allows local governments to authorize, regulate, and tax various commercial marijuana-related activities....we estimate that the state and local governments could eventually collect hundreds of millions of dollars annually in additional revenues."

The LAO further reports that Proposition 19 could result in additional savings by reducing the number of marijuana offenders incarcerated in state prisons and county jails, as well as the number supervised on probation or parole. The report noted that jail beds no longer needed for marijuana

violators could be used for other criminals who are now being released early because of a lack of jail space.

It is a difficult balance to find: the danger of allowing people to use a controlled substance versus the danger of leaving it unregulated. Come November, citizens will cast their vote. If the measure passes, California will be the first state to suggest that criminalizing marijuana has done more social harm than using it ever could.